FILED
APR 9 1956
HAROLD B. WILLEY, C

IN THE

# SUPREME COURT OF THE UNITED STATES

.....TERM, 1956.

No. 833.

GLENN JONES, TRUSTEE OF INDEPENDENT PLOW, INC., BANKRUPT,
*Petitioner,*

vs.

UNITED STATES OF AMERICA,
*Respondent.*

**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.**

HARRY GILLIG, JR.,
FERD E. EVANS, JR.,
Wichita, Kansas,
*Counsel for Petitioner.*

## INDEX


Opinion Below ..... 2
Jurisdiction ..... 2
Questions Presented ..... 2
Statutes Involved ..... 3
Statement ..... 3
Reasons for Granting the Writ ..... 5
Conclusion ..... 8
Appendix A—Statutes ..... A1
Appendix B—Opinion and Judgment Below ..... A4
Appendix C—Conflicting Opinions ..... A9


### CITATIONS

Cases—


*Bryant* v. *Swofford Bros. Dry Goods Company*, 214 U. S. 279 (1909) ..... 8
*Clark* v. *Pargeter*, 142 Kan. 781, 52 P. 2d 617 (1935) ..... 5, 6, 7, A17
*First National Bank in Wichita* v. *The Paramount Transit Company*, 139 Kan. 808, 33 P. 2d 300 (1934) ..... 6, 7, A9
*Leffert* v. *Jackman*, 227 N. Y. 310, 125 N. E. 446 (1919) 7
*Post & Davis Co., In re*, 219 Fed. 171 (C. C. A. 2, 1914 1914) ..... 7, A33
*Royal Indemnity Company* v. *American Bond & Mortgage Company*, 289 U. S. 165 (1933) ..... 4, 8
*Vail* v. *Hamilton*, 85 N. Y. 453 (1881) ..... 7, A42
*Willcox* v. *Goess*, 92 F. 2d 8 (C. C. A. 2, 1937) ..... 7, A38


Statutes—

Bankruptcy Act of 1898, as amended—


Sec. 64(a), 11 U. S. C., §104(a) ..... 4

Sec. 70(c), 11 U. S. C., §110(c) ..... 3, 5, A1
Sec. 70 (e) (1), 11 U. S. C., § 110(e)1 ..... 3, 5, A1
General Statutes of Kansas 1949, 17-3801 ..... 3, 4, A1
New York Stock Corporation Law, Sec. 16(1) ..... 3, 7, A2
Reconstruction Finance Corporation Act, as amended, Sec. 3(a), 15 U. S. C., §603(a) ..... 4

United States Code—

Title 28, Sec. 1254(1) ..... 2
Title 31, Sec. 191 ..... 4

Miscellaneous—

Collier on Bankruptcy (14th Ed.), Vol. 4, Paragraph 70.47 ..... 5
Collier on Bankruptcy (14th Ed.), Vol. 4, Paragraph 70.69 ..... 5

IN THE

# SUPREME COURT OF THE UNITED STATES

---

..... TERM, 1956.

---

No. .....

---

GLENN JONES, TRUSTEE OF INDEPENDENT PLOW, INC., BANKRUPT,
*Petitioner,*

vs.

UNITED STATES OF AMERICA,
*Respondent.*

---

**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.**

Glenn Jones, as Trustee in Bankruptcy of Independent Plow, Inc., Bankrupt, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit, entered in the above entitled cause on the 5th day of December, 1955.

## CITATIONS TO OPINIONS BELOW.

The memorandum opinion of the referee in bankruptcy is unreported and is printed in full at page 17 and following of the transcript of record before the court below. The order of the district court, reproduced in full at page 33 of said transcript, is likewise unreported. The opinion of the court of appeals (R. 3-8), printed in Appendix B hereto,[1] is reported in 229 F. 2d 84.

## JURISDICTION.

The judgment of the court of appeals, which was entered on December 5, 1955, is found on page 9 of the record of the court below and is printed in Appendix B hereto.[2] A timely petition for rehearing (R. 10-15) was filed December 23, 1955 (R. 15), and was denied on January 11, 1956 (R. 16). The jurisdiction of this court is invoked under 28 U. S. C., Sec. 1254 (1).

## QUESTION PRESENTED.

Whether, in a state whose courts permit creditor representatives to attack mortgages of substantially all of a corporation's assets, a trustee in bankruptcy has standing in an appropriate proceeding in the bankruptcy court to attack such mortgages given by the corporate bankrupt.

---

[1] *Infra*, p. A4.

[2] *Infra*, p. A8.

## STATUTES INVOLVED.

The statutory provisions involved are Sections 70(c) and 70(e)(1) of the Bankruptcy Act, 11 U. S. C., Sections 110(c) and 110(e)(1); General Statutes of Kansas 1949, 17-3801; and Sec. 16(1), New York Stock Corporation Law. These statutes are printed in Appendix A.[3]

## STATEMENT.

Independent Plow, Inc., a Kansas corporation, became a voluntary bankrupt on September 26, 1953. The jurisdiction of the district court was invoked because the case arises out of the exercise by the bankruptcy court of its summary jurisdiction to adjudicate the validity of liens claimed upon the property of the bankrupt.

About a year prior to its adjudication in bankruptcy, the bankrupt corporation borrowed $200,000.00 from Reconstruction Finance Corporation under the Defense Production Act of 1950. To secure said loan the bankrupt's officers gave liens to RFC covering substantially all the bankrupt's assets. The consent of the bankrupt corporation's stockholders to these liens—a chattel mortgage, several mortgages, and the assignment of a large account receivable, together covering substantially all the assets—was not obtained as required in such cases by General Statutes of Kansas 1949, 17-3801. Following the adjudication in bankruptcy, the United States succeeded to the claim of Reconstruction Finance Corporation, and thereafter the trustee sold the assets allegedly subject to the liens of the United

---

[3]Sec. 70(c) is printed *infra*, p. A1. Sec. 70(e)(1) is printed *infra*, p. A1. Sec. 17-3801 is printed *infra*, p. A1. Sec. 16(1) is printed *infra*, p. A2.

States for $28,600.00. The United States, whose claim under the RFC loan amounted to $144,082.19 as of the date of bankruptcy, laid claim to the $28,600.00 by virtue of the foregoing-described liens; and in the alternative maintained that its claim should be accorded a fifth priority in bankruptcy by virtue of 31 U. S. C., Sec. 191, and Sec. 64(a) of the Bankruptcy Act (11 U. S. C., Sec. 104(a)). After several hearings, the referee on June 29, 1954, made findings of fact and conclusions of law and entered his order (1) holding the liens to be invalid as against the trustee in bankruptcy as constituting transfers of substantially all the bankrupt's assets without compliance with G. S. Kan. 1949, 17-3801, and (2) holding the claim of the United States to be allowable only as a common claim by reason of Sec. 3(a) of the Reconstruction Finance Corporation Act (15 U. S. C., Sec. 603(a)). Upon a petition for review, the district judge affirmed the referee without opinion.

The court below reversed the district court. The court correctly stated the majority rule, as set forth by this Court in *Royalty Indemnity Company* v. *American Bond & Mortgage Company*, 289 U. S. 165 (1933),[4] to be that creditor representatives have no standing to attack corporate transfers of substantially all the assets made without the statutorily-required consent of stockholders. It went on to say that it could not find where the Kansas courts had decided whether creditors or their representatives had such standing under G. S. Kan. 1949, 17-3801. And accordingly it applied the general rule to find the trustee in bankruptcy has no such standing. This ruling made it unnecessary for the court below to rule on the question of the priority to which

---

[4]The *Royal Indemnity* case held that under the law applicable to a Maine corporation, its creditors had no standing to attack its filing a voluntary petition in bankruptcy without the stockholder approval required by the state statute.

the United States would be entitled on an unsecured loan made by Reconstruction Finance Corporation under the Defense Production Act of 1950.

## REASONS FOR GRANTING THE WRIT.

1. The uniform application and enforcement of the Bankruptcy Act clearly require a review of the decision of the court below. The decision produces the anomalous result of a trustee in bankruptcy in Kansas possessing *fewer* rights in the bankruptcy court than are possessed by general creditors in the state courts of Kansas. This is exactly what the so-called "strong-arm clause" and Section 70(e)(1) of the Bankruptcy Act (Sec. 70(c), 11 U. S. C., Sec. 110(c)[5] and Sec. 70(e)(1), 11 U. S. C., Sec. 110(e)(1),[6] respectively) were enacted to prevent;[7] and to permit the decision below to stand will produce in Kansas an undesirable frustration of the letter and the spirit of those provisions of the Act.

The trustee in bankruptcy is clothed with all the powers and rights possessed under the state law by a lien creditor.[8] The law of Kansas, erroneously interpreted otherwise by the court below, at the suit of a creditor representative avoids corporate transfers of all or substantially all the corporate assets without the consent or approval of the holders of two-thirds the voting stock at a stockholders' meeting duly called for the purpose. In *Clark* v. *Pargeter*,

---

[5]Appendix A, *infra*, p. A1.

[6]Appendix A, *infra*, p. A1.

[7]See 4 Collier on Bankruptcy (14th Ed.), Paragraphs 70.47 and 70.69.

[8]Sec. 70(c) of the Bankruptcy Act, 11 U. S. C., Sec. 110(c).

142 Kan. 781, 52 P. 2d 617 (1935),[9] a state-court receiver sued to recover substantially all the assets of the insolvent corporation, which assets had been transferred without stockholder approval. The Supreme Court of Kansas, after stating expressly (*infra*, page A22) that the question presented was whether the assets in controversy constituted a corporate asset "in the nature of a trust fund *for the benefit of all the creditors*" (emphasis added), answered that question in the affirmative and, having nailed down the plaintiff receiver's status as a *creditor* representative, then affirmed the judgment for the receiver on the ground (*inter alia*) that the transfer had not received stockholder approval as required by the statute.[10] The court below denied to this petitioning trustee in bankruptcy the status and power which the state courts in his jurisdiction grant to creditor representatives.

2. The decision below conflicts, on an important matter of applicable state law, with the holdings of the Supreme Court of Kansas in *Clark* v. *Pargeter*, *supra*, and *First National Bank in Wichita* v. *The Paramount Transit Company*, 139 Kan. 808, 33 P. 2d 300 (1934).[11] The court below erroneously stated that there is *no* Kansas law on the subject of the status *vel non* of a creditor or creditor representative to invoke the statute requiring stockholder approval of transfers of substantially all a corporation's assets. It is difficult to see how the Supreme Court of Kansas could have made much plainer its position to the contrary. *First National Bank* v. *Paramount* established that the statute requiring stockholder approval of a corporate disposition of all or substantially all its assets ap-

---

[9]Appendix C, *infra*, p. A17 *et seq.*

[10]See Appendix C, *infra*, p. A32.

[11]Appendix C, *infra*, p. A9 *et seq.*

plies to a chattel mortgage. Thereafter, *Clark* v. *Pargeter*, relying in part on *Paramount*, avoided a corporate transfer at the suit of a receiver suing "for the benefit of all the creditors" as outlined above under the discussion of the first reason for granting a writ herein.

3. The decision of the court below conflicts with the holding of the Circuit Court of Appeals for the Second Circuit *In re Post & Davis Co.*, 219 Fed. 171 (C. C. A. 2, 1914),[12] as followed by several decisions of that Circuit including *Willcox* v. *Goess*, 92 F. 2d 8 (C. C. A. 2, 1937).[13]

The *Post & Davis* case and its descendants in the Second Circuit were bankruptcy cases arising in New York. The law of that state is like the law of Kansas in that a receiver is permitted to attack corporate mortgages made in violation of the statute requiring stockholder approval of certain transfers. *Vail* v. *Hamilton*, 85 N. Y. 453 (1881).[14] When a trustee in bankruptcy attacked a corporate mortgage of substantially all the corporation's assets without the stockholder approval required by the New York statute,[15] the Second Circuit in *Post & Davis* followed the New York law and vindicated the trustee.[16] This specific holding has been followed by the Second Circuit several times since, perhaps the case containing the clearest discussion of the applicable New York law being *Willcox* v. *Goess*, *supra*.

[12]Appendix C, *infra*, p. A33 *et seq.*

[13]Appendix C, *infra*, p. A38 *et seq.*

[14]Appendix C, *infra*, p. A42 *et seq.*

[15]The statute in 1914 was Art. 2, Sec. 6, Laws of 1909 (Consolidated Laws, c. 59), the substance of which is now Sec. 16(1), New York Stock Corporation Law (Appendix A, *infra*, p. A2).

[16]Some years later, the New York Court of Appeals made it crystal-clear that the principle of *Vail* v. *Hamilton*, *supra*, applies to suits by creditor representatives. *Leffert* v. *Jackman*, 227 N. Y. 310, 125 N. E. 446 (1919).

As pointed out above under the discussion of the petitioner's first two reasons for the granting of a writ herein, the Supreme Court of Kansas has, like the New York courts, permitted a receiver as a creditor representative to attack corporate transfers made in contravention of the stockholder-approval statute. And the court below, in denying to a trustee in bankruptcy the standing to attack the mortgages in the instant case, has not only refused to follow the controlling Kansas law but has aligned itself in conflict with the Second Circuit.

In this connection, it should be pointed out that this Court's decision in *Royal Indemnity Company* v. *American Bond & Mortgage Company*, 289 U. S. 165 (1933), is not controlling for the reason that the Court was there construing the law of Maine, whereas a bankruptcy court is bound by the law of the particular state on questions of creditors' rights (*Bryant* v. *Swofford Bros. Dry Goods Company*, 214 U. S. 279, 1909), and therefore the law of Kansas applies in the instant case.

## CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

HARRY GILLIG, JR.,
FERD E. EVANS, JR.,
Wichita, Kansas,
*Counsel for Petitioner.*

# APPENDIX

# APPENDIX

## APPENDIX A.

Section 70 (c) of the Bankruptcy Act, 11 U. S. C., Sec. 110 (c):

(c) The trustee may have the benefit of all defenses available to the bankrupt as against third persons, including statutes of limitation, statutes of frauds, usury, and other personal defenses; and a waiver of any such defense by the bankrupt after bankruptcy shall not bind the trustee. The trustee, as to all property, whether or not coming into possession or control of the court, upon which a creditor of the bankrupt could have obtained a lien by legal or equitable proceedings at the date of bankruptcy, shall be deemed vested as of such date with all the rights, remedies, and powers of a creditor then holding a lien thereon by such proceedings, whether or not such a creditor actually exists.

Section 70 (e) of the Bankruptcy Act, 11 U. S. C., Sec. 110 (e) (1):

(e) (1) A transfer made or suffered or obligation incurred by a debtor adjudged a bankrupt under this title which, under any Federal or State law applicable thereto, is fraudulent as against or voidable for any other reason by any creditor of the debtor, having a claim provable under this title, shall be null and void as against the trustee of such debtor.

General Statutes of Kansas 1949, 17-3801:

**Corporate assets and franchises; directors may sell on authorization of stockholders' vote.** Any corporation shall have the additional right and power to make disposition

of all or substantially all of its property, assets and good will, or good will, by sale, lease, exchange or otherwise, to such person or corporation on such terms and conditions and for such considerations as its board of directors may determine, when and as authorized or approved by the vote of the holders of not less than two-thirds in amount of its outstanding shares of capital stock entitled to vote, or two-thirds of the stockholders of any corporation which does not permit voting by shares entitled to vote, and represented at a meeting duly called for the purpose in accordance with the bylaws, or, in the absence of such provisions in the bylaws, then upon not less than ten days' written notice.

Section 16(1), New York Stock Corporation Law:

1. Every stock corporation other than a moneyed corporation shall have the power to borrow money and contract debts, when necessary for the transaction of its business, or for the exercise of its corporate rights, privileges or franchises, or for any other lawful purpose of its incorporation; and it may issue and dispose of its obligations for any amount so borrowed, and may mortgage its property and franchises to secure the payment of such obligations, or of any debt contracted for such purposes. The consent to the execution of such mortgage, except a purchase-money mortgage, by the holders of not less than two-thirds of the total number of shares outstanding entitled to vote thereon, given either in writing, or by vote at a meeting of the stockholders called for that purpose in the manner prescribed by section forty-five, shall be required. If the property to be mortgaged consists of real estate, a certificate that such consent was given by the stockholders in writing, or that it was given by a vote at a meeting as aforesaid, shall be subscribed, acknowledged and verified by the president or a vice-president and by

the secretary or an assistant secretary of the corporation, and shall be recorded in the office of the recording officer of each county within the state in which the mortgage is filed or recorded, or, if no part of the mortgaged property be located within the state, shall be filed in the office of the clerk of the county wherein the office of the corporation is located. If the property to be mortgaged consists of chattels, such certificate shall be filed in the office of the recording officer of each county within the state in which the chattel mortgage is filed, or, if no part of the mortgaged chattels be located within the state, in the office of the clerk of the county wherein the office of the corporation is located. When authorized by like consent, the directors, under such regulations as they may adopt, may confer on the holder of any debt or obligation, secured or unsecured, the right to convert the principal thereof within such period and upon such terms and conditions as may be fixed by the resolution of the directors conferring the right of conversion, into stock of the corporation.

## APPENDIX B.

Opinion of the court below (United States Court of Appeals for the Tenth Circuit):

This appeal is from a judgment confirming an order of the referee denying both the validity of a chattel mortgage lien and the priority claim of the United States as a secured lienholder in the matter of Independent Plow, Inc., bankrupt.

The United States, as transferee of the Reconstruction Finance Corporation,[1] first asserts a secured lien claim against proceeds of the trustee's sale of the bankrupt's assets, under a chattel mortgage executed by the bankrupt to the Reconstruction Finance Corporation. The bankrupt, a Kansas corporation primarily manufacturing farm machinery, had procured a $200,000.00 defense loan from the R. F. C. under authority of Sections 302 and 304 of the Defense Production Act of 1950, as amended (64 Stat. 798, 801, 802; 50 U. S. C. App. 2092, 2094) to enable it to complete its munitions contracts with the United States Army. To secure the payment of its $200,000.00 promissory note covering the defense loan, the president and secretary of the bankrupt signed and delivered a chattel mortgage (among other security instruments) to the R. F. C. Under the mortgage the bankrupt contracted to mortgage and convey to R. F. C. "All of the buildings, machinery, equipment, furniture and fixtures, belts, motors, power plants and tools, jigs and dies" and to "pledge all personal prop-

[1]Transferred subsequent to the petition in bankruptcy, to the Secretary of the Treasury pursuant to the Reconstruction Finance Corporation Liquidation Act (P. L. 163, 83rd Cong., 1st Sess., 67 Stat. 230; and E. O. 10489, 18 F. R. 6201, Sept. 29, 1953).

DARK PAGE BL

erty" located on its premises "other than automotive and airplane equipment, inventory and accounts receivable."

The referee denied the validity of the chattel mortgage on the ground that its execution, together with the other security instruments, constituted a sale of all or substantially all of the bankrupt corporation's assets without proper authorization or approval by the shareholders of the bankrupt pursuant to Sec. 17.3801, Kansas Gen. Statutes (1949 Ed.). This section of the statutes empowers a corporation "to make disposition of all or substantially all of its property, assets and good will, or good will, by sale, lease, exchange or otherwise * * * on such terms and conditions and for such considerations as its board of directors may determine, when and as authorized or approved by the vote of the holders of not less than two-thirds in amount of its outstanding shares of capital stock entitled to vote * * * and represented at a meeting duly called for the purpose in accordance with the by-laws * * *."[2]

The R. F. C. asserts the inapplicability of Sec. 17.3801 of the Kansas Statutes for lack of evidence disclosing that a "substantial part" of the bankrupt's property was transferred by the mortgage transactions. And it disputes the standing of the trustee in bankruptcy, as the representative of the creditors of the bankrupt corporation, to question the validity of the chattel mortgage, contending that the statute was passed for the protection of the stockholders only and not for the protection of the creditors of the corporation.

We must sustain as not clearly erroneous the conclusion of the referee, affirmed by the trial court, that the

---

[2]The Kansas court has extended the application of this statute to chattel mortgages. See *First National Bank* v. *Paramount Transit Co.*, 139 Kan. 808, 33 P. 2d 300.

BLEED THRU

transfer comprised substantially all of the assets of the bankrupt corporation. This conclusion is manifest from the stated coverage in the chattel mortgage when taken in consideration with the amount of the loan and the insignificant amount recovered in a sale of all the assets in bankruptcy, precluding a continuation of the business of the corporation.

Under the great weight of authority, statutes requiring numerical stockholder approval of a mortgage or transfer of substantially all of the corporate assets are "for the protection of the stockholders and have nothing to do with the interests or rights of creditors." See *Royal Ind. Co.* v. *American Bond & Mortgage Co.*, 289 U. S. 165, 171. And on that premise, most of the courts have said that a trustee in bankruptcy or assignee of creditors is without standing to challenge the validity of a mortgage executed by the corporation. Fletcher, Corporations, Vol. 7, §3119; *Greene* v. *Reconstruction Finance Corp.*, 100 F. 2d 34. Only New York seems to hold to the contrary, but the second circuit has very recently acknowledged that the New York statute was "designed not for the benefit of creditors but to protect stockholders from improvident, collusive, or unwise acts of the directors." See *American Trust Co.* v. *New York Credit Men's Adj. Bureau*, 207 F. 2d 685, 688.

The question of the validity of a chattel mortgage given by a bankrupt is, of course, one of local law, and we are bound by the construction of Sec. 17.3801 by the Kansas Court, if that court has spoken. But where state law is silent upon a question, and there is a conflict of decisions in other jurisdictions, the Federal court construing the law of the state, will assume that the state court would follow the weight of authority. And see *Springfield* v. *Carter*, (8 Cir.) 175 F. 2d 914; *Adam Hat Stores* v. *Lefco*, (3 Cir.) 134 F. 2d 101; *Vandenbark* v. *Busiek*, (7 Cir.) 126 F. 2d

893; *Crab Orchard Imp. Co.* v. *Chesapeake & O. Ry. Co.*, (4 Cir.) 115 F. 2d 277; *Schwager* v. *Schwager*, (7 Cir.) 109 F. 2d 754; *Pinson* v. *Abbott*, 93 F. Supp. 120 (D. New Mex., 1950); *Great American Ind. Co.* v. *Garrison*, 75 F. Supp. 811; *Loughman* v. *Pitz*, 36 F. Supp. 302; *Stevenson* v. *Richardson County, Nebraska*, 9 F. R. D. 437. There are no Kansas cases dealing with the capacity of a trustee in bankruptcy or an assignee of creditors to challenge the validity of the mortgage under this statute. The referee and the trial court, however, construed *First National Bank* v. *Paramount Transit Co.*, 139 Kan. 808, 33 P. 2d 300, cited with approval in *Clark* v. *Pargeter*, 142 Kan. 781, 52 P. 2d 617, as an indication that the Kansas court would sustain the standing of a trustee in bankruptcy or assignee to attack the validity of a chattel mortgage not executed in accordance with the requirements of the predecessor of Sec. 17.3801.

In the Paramount Transit case an equity receiver did permissibly challenge the validity of the chattel mortgage under the applicable statute. But the question of his capacity to do so was never raised or decided in that case. And the same may be said of the Pargeter case, where the receiver was actually asserting rights against the appellants who were stockholder-creditors of the corporation. But even so, there is a clear and rational distinction between the capacity of a receiver acting as the arm of the court with the power and duty to safeguard the rights of all of the parties and a mere trustee or assignee standing in the shoes of the creditors of a corporation.

We can find nothing in the Kansas receivership cases to indicate that Kansas would depart from the great weight of authority on the question of the capacity of a trustee in bankruptcy or an assignee of creditors to challenge the validity of the mortgage under a statute obviously

enacted solely for the benefit of the stockholders of a corporation. We hold, therefore, that the R. F. C. is entitled to the status of a preferred creditor in its claim against the bankrupt. And this conclusion is dispositive of all other questions presented on appeal.

Judgment is reversed.

Judgment of the court below (United States Court of Appeals for the Tenth Circuit):

Fourteenth Day, November Term, Monday,
December 5th, 1955.

Before Honorable Sam G. Bratton, Honorable Alfred P. Murrah and Honorable John C. Pickett, Circuit Judges.

This cause came on to be heard on the transcript of the record from the United States District Court for the District of Kansas and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said district in this cause be and the same is hereby reversed, and that this cause be and the same is hereby remanded to the said district court for further proceedings in accordance with the views expressed in the opinion of the court.

## APPENDIX C.

*First National Bank in Wichita* v. *The Paramount Transit Company*, 139 Kan. 808, 33 P. 2d 300 (1934).

SYLLABUS BY THE COURT.

Corporations—*Powers—Mortgage of Property—Consent of Stockholders.* Laws 1931, chapter 154, § 1 (R. S. 1933, Supp. 17-620a) construed, and it is held that in that portion of the statute providing that any corporation shall have the right to 'make disposition of all or substantially all of its property * * * by sale, lease, exchange or otherwise,' etc., the words 'or otherwise' are neither redundant nor meaningless, but must be given force and effect; they contemplate and include some other or further disposition than a sale, lease or exchange, and a disposition by chattel mortgage is within the purview of the act.

The opinion of the court was delivered by

THIELE, J.: This is an appeal involving the construction and validity of a chattel mortgage.

Under date of September 5, 1931, the Paramount Transit Company of Wichita executed and delivered to the Prairie State Bank of Augusta its chattel mortgage to secure payment of a note for $7,048.52. The mortgage was on a form printed for the use of the bank and obviously was intended for general use locally, for it makes provisions for live-stock loans, for shipment of cattle, removal from Butler County, etc. The mortgage blank was filled in with typewriter and shows the property was located and kept at Wichita, in Sedgwick County, and on the face of the mortgage it is described as—

"All property as set forth in exhibit A attached hereto and made a part hereof as if fully rewritten herein."

In another place this property is represented to be free and clear of encumbrance "except mortgages and indebtedness referred to in exhibit A." Exhibit A contains a list of forty-eight specific items, at the head of the list being this statement:

"All property of the Paramount Transit Company of whatsoever kind including the following:"

The first twenty items are trucks, truck bodies and trailers. The remaining twenty-eight items are office equipment, automobile equipment, etc., the list concluding with the statement:

"Free and clear of all encumbrances except chattel mortgages and indebtedness, if any, now of record. All property listed above in numbers 20 to 48, inclusive, free and clear from all encumbrances."

From a rather sketchy abstract we gather the following: Sometime later Wallace T. Rouse filed an action for money against the transit company and asked for the appointment of a receiver, and a receiver was appointed.

On March 7, 1932, the appellant bank filed its intervening petition, to which was attached a copy of the above chattel mortgage, and on the same day it filed its application alleging that the receiver had in his possession the property set out in an exhibit attached to said application; the execution of the chattel mortgage was alleged; that the entire sum secured was unpaid; that the security was inadequate to pay the amount due, and asking that the receiver deliver to it the above-described property.

On March 8, 1932, the trial court made its order finding the chattel mortgage to have been made and filed and that

the personal property described in said exhibit was probably insufficient to pay the amount due to appellant bank; that the receiver consents thereto, and orders that the receiver deliver the property to the plaintiff bank. The designated property was all that included in numbers 20 to 48, inclusive, on the chattel mortgage.

Although not clearly shown by the abstract, on March 10, 1932, the receiver also delivered one Dodge truck to the appellant bank. Thereafter the appellant filed an amended intervening petition alleging that it had sold the assets delivered to it for $400, and setting up a balance due, and alleging further that after the appointment of the receiver certain property belonging to the appellant was sold by the receiver, and certain notes and amounts belonging to appellant were collected, all of which was property mortgaged to appellant and on which it had a first lien; that the receiver had said receipts in his hands and should be ordered to pay to appellant the balance due it, and it prayed for judgment accordingly.

The receiver objected to the allowance of appellant's claim, and on hearing it was stipulated that the matter be presented on three grounds:

1. Whether or not the mortgage is ambiguous with reference to property described.

2. If not ambiguous, is the language confined to the specific enumeration set out or is it broad enough to include properties other than enumerated?

3. Whether or not it is a valid mortgage under the statute providing how corporations may mortgage or pledge property.

The principal question seems to have been whether the certificate of convenience issued to the company was in-

cluded in the mortgaged property. On May 8, 1933, the court made the following finding:

> "The court is of the opinion that under the broad powers of the directors of a corporation, they were authorized to execute the mortgage involved in this controversy. The court further finds that the description contained in the mortgage does not include the certificate of convenience."

Thereafter appellant asked leave to file a second amended intervening petition to show the facts and circumstances leading up to the execution of its chattel mortgage and to offer evidence thereon, which the court denied. Thereafter the court found that the directors of the transit company were authorized to execute the chattel mortgage, and that the mortgage was not ambiguous and did not include the certificate of convenience. Appellant's motion for a new trial was denied.

Since this appeal was taken and after appellant's abstract was filed, the trial court. by a *nunc pro tunc* order, corrected the above-quoted finding to read:

> "The court is of the opinion that the description contained in the mortgage does not include the certificate of convenience, and the execution of the mortgage as so construed was within the broad powers of the directors without authorization or approval by the stockholders."

The original judgment was not otherwise changed. Appellant appeals, contending that the court erred in concluding that the description in its mortgage did not include the certificates of convenience, in not permitting it to file a second amended intervening petition, and in rendering judgment after death of plaintiff and before a revivor was had, and in overruling its motion for a new trial.

As to the revivor, the court was informed on June 7, 1933, by appellant's counsel, that the plaintiff had died November 26, 1932, and at the same time appellant asked permission to file amended pleadings. The court then suggested that an application to revive be made promptly, and the order of revivor was made August 28, 1933. The motion for a new trial is not abstracted. So far as the record shows, this particular complaint was not urged to the trial court. In any event, we are not persuaded that it affected appellant's rights in any manner. Without discussing the effect on the action of plaintiff's death, in the interval between his death and the revivor of the action the court was not without jurisdiction over the receiver and the property in his control, and it has been made clear that appellant's controversy is with the receiver rather than the plaintiff.

Two main questions are presented: Did the chattel mortgage description include the certificates of convenience and other property of the transit company not specifically enumerated, and if it be held that it did, was the chattel mortgage valid?

The last question will be first considered. Assuming that the chattel mortgage covered all of the personal property of every kind and character of the transit company, as appellant contends, was the execution and delivery of it a valid exercise of the transit company's corporate power? While not specifically stated, it seems to be conceded that the transit company had no real estate, and that if the chattel mortgage be construed according to appellant's contention, it covered everything the company owned. Under R. S. 17-610, a corporation had power to borrow money on the credit of the corporation not exceeding its authorized capital stock, and to pledge the property and income of the corporation, it being provided that the section should not

apply to debentures secured by real estate or other securities, and under R. S. 17-620, a corporation had power to convey lands. Both sections were affected by acts passed in 1931. By Laws 1931, chapter 138 (R. S. 1933 Supp. 17-610), approved March 16, 1931, effective on publication in the statute book (May 28, 1931), R. S. 17-610 was amended to read:

> "Corporations shall have power to borrow money on the credit of the corporation, and may execute bonds or promissory notes therefor, and may pledge the property and income of the corporation."

At the same session of the legislature, Laws 1931, chapter 154 (R. S. 1933 Supp., 17-620a), approved February 25, 1931, effective on publication in the official state paper and published February 26, 1931, was enacted. It reads:

> "That any corporation now or hereafter incorporated under the laws of Kansas shall have the additional right and power to make disposition of all or substantially all of its property, assets and good will, or good will, by sale, lease, exchange or otherwise, to such person or corporation on such terms and conditions and for such considerations as its board of directors may determine, when and as authorized or approved by the vote of the holders of not less than four-fifths in amount of its outstanding shares of capital stock entitled to vote, at a meeting duly called for the purpose in accordance by the by-laws, or, in the absence of such provision in the by-laws, then upon not less than ten days' written notice."

Both of these acts were enacted and effective some months prior to the date of the mortgage in question. Appellee argues that under the last-mentioned act, if appellant's contention as to property covered by the chattel mortgage is correct, the chattel mortgage was invalid,

while appellant contends that the act by its own terms creates "an additional right and power" and does not affect the validity of the chattel mortgage. We cannot agree with appellant's contention. Notwithstanding the use of the expression "an additional right and power," the mere enactment put a restriction on a corporation's "disposition of all or substantially all of its property, assets and good will, by sale, lease, exchange or otherwise," except upon compliance with the statute. Prior to the enactment there was no specific provision for leasing or exchanging property, and to this extent it may be said the act created an "additional right and power." Likewise there was no specific grant of power to dispose of all or substantially all of the assets; such disposal could only be made by consent of all stockholders; to permit such disposal by a portion only may be said to be an additional right to and power in the corporation. Prior to the passage of the act corporations could borrow money and pledge assets as limited by R. S. 17-610, and they had, as they still have, the right to convey real estate, but the enactment changed the amount which could be borrowed and the assets which could be pledged, as well as the quantity of real estate which could be sold, if the effect was to dispose of all or substantially all of the property, assets, etc. The fact that R. S. 17-610 was amended after R. S. 1933 Supp. 17-620a was enacted does not lead to any different conclusion, for, having restricted the disposition of property to stockholder approval, the necessity or advisability of limiting a loan thereon and a pledge thereof had, to a considerable extent, disappeared. The statute uses the words "to make disposition * * * by sale, lease, exchange or otherwise." While many citations might be given holding that "to make disposition," "to make disposal," "to dispose of" and the like, contemplate and mean an out-and-out sale and a complete alienation, here the

language must either be so construed that the words "or otherwise" are redundant and mean nothing is added to "sale, lease, exchange," or they must be given force and effect so as to contemplate some other or further disposition. In *Platt* v. *Union Pacific R. R. Co.*, 99 U. S. 48, 25 L. Ed. 425, where the act of congress incorporating the company and providing that certain lands "not sold or disposed of" should be subject to preemption and settlement, it was held that the words "or disposed of" were not redundant or synonymous with the word "sold," but that they contemplated a use of the lands granted different from a sale, and that a mortgage was such a use.

In our opinion the statute contemplates and includes disposition by chattel mortgage, and is applicable where all or substantially all of the corporate assets are to be mortgaged.

In view of our conclusion, there is no need to discuss the question whether the description in the chattel mortgage covered personal property other than that specifically enumerated.

The appellant desired permission to file a second amended intervening petition to show the circumstances under which the chattel mortgage was executed and delivered, and the trial court's refusal is complained of. The amended intervening cross petition, on which the action was tried, alleged that the chattel mortgage was "duly made, executed and delivered," and this was a sufficient allegation to permit proof that the stockholders had approved the making of it, if that had been the case. However, it is not claimed by appellant that the proposition was ever submitted to the stockholders; on the contrary, in a reply brief appellants state that although the abstracts do not show it, it was admitted at the trial a cer-

tain resolution of the board of directors of the transit company was passed authorizing the board of directors to borrow from the appellant bank "executing as security for said note a chattel mortgage covering all of the property of the corporation," etc. To have shown in detail how this resolution was passed would have made no difference, there being no claim the stockholders had acted. The court's refusal to permit further amendment of the intervening petition was not error.

The appellee did not and does not complain of the trial court's ordering the receiver to deliver certain of the mortgaged property to appellant, which was done before the claim was made that the chattel mortgage covered other than the specifically enumerated articles, and that matter is not before us.

The judgment of the trial court is affirmed.

*Clark* v. *Pargeter*, 142 Kan. 781, 52 P. 2d 617 (1935).

SYLLABUS BY THE COURT.

1. CORPORATIONS—*Insolvency—Preference of Stockholders.* When a corporation is insolvent or in failing condition, it should not be permitted to so deal with its shareholders who are creditors that they receive a preferential right to the assets of the corporation to the detriment of the general creditors.

2. SAME—*Corporate Powers and Liabilities—Transfers to Creditors.* A corporation may not transfer all or substantially all of its property to a creditor or creditors unless such action is authorized or approved by the vote of the holders of not less than four fifths in amount of its outstanding shares of capital stock entitled to vote in the manner required by Laws 1931, ch. 154, Sec. 1 (R. S. 1933 Supp. 17-620a).

3. SAME—*Insolvency—Validity of Transfer to Creditors.* The note in controversy, given to make good impairment of the capital stock of the corporation, is a trust fund for creditors, and as against assignees who took with notice of its character and who gave nothing for it beyond the discharge of a preexisting debt, the receiver of the insolvent corporation is entitled to possession.

4. BILLS AND NOTES—*Validity—Capital Stock Notes.* A note given to make good impaired capital stock of a cooperative association is not uncollectible because it does not contain a statement such as "Given for shares in ....." as required by R. S. 1933 Supp. 17-1239, securities of such associations being exempt under R. S. 1933 Supp. 17-1224.

The opinion of the court was delivered by

THIELE, J.: The question in this appeal is who is entitled to a certain promissory note.

The facts giving rise to the controversy may be summarized as follows: Some years prior to 1930, the Pretty Prairie Cooperative Grain Company was incorporated with an authorized capital of $50,000 divided into 250 shares of a par value of $200 each. It engaged in business, and on June 1, 1930, stock to the amount of $4,800 had been subscribed and paid for by thirty-six stockholders. Apparently the business had been conducted at a loss, for about the latter date it was determined to get additional capital but, before seeking it, that the impaired capital should be made good. The financial statement of June 1, 1930, showed that taking the assets at values therein fixed and offsetting the admitted liabilities, to put the outstanding capital stock at par required payment into the treasury of $13,868.44. To accomplish this end, and so that future stockholders paying par for treasury stock

would be protected, twenty-four stockholders executed to the order of the company their promissory note, dated June 1, 1930, due thirty days after date, for the sum of $13,868.44. At the same time, a contract was made between the company, party of the first part, and the twenty-four signers, parties of the second part, a "whereas" clause reciting second parties executed the notes as accommodation makers, and the contractual clause being as follows:

> "And we and each of us, do further authorize and instruct the officers of the said Pretty Prairie Co-operative Grain Company to retain the net profits accruing and earned by said company belonging to each of us and apply the same in payment of the said promissory note hereinbefore described, in whole if our share of the net profits be sufficient to pay and liquidate said note, and if not, that they be applied to the part payment of said note, and if said net profits be more than sufficient to pay said note in full, that the remaining portion thereof shall be apportioned by the officers of said company to each of us in accordance with our respective shares owned by each of us."

Some payments were made on the note which we need not notice. Treasury stock was thereafter sold at par. On the balance sheet of the company of May 31, 1931, the note was carried as an asset at $12,878.89, which seems to have been the balance due on the principal, and on the balance sheet of May 31, 1932, it was carried as an asset at the same figure. At least for a time prior to May 12, 1933, the business of the company was unprofitable, for on that date it was indebted to defendant McGowan, who was not a maker of the note, in the sum of $200, to defendant Pargeter, who was not a signer, for wheat delivered in the sum of $972.90, and to a number of the signers of the note, in varying amounts for wheat de-

livered. The company was also indebted to other creditors, and was, in fact, insolvent. It is here noted that certain receipts were set up in an account and carried as "surplus," applicable to the payment of the note. At a special stockholders' meeting on April 22, 1933, the following proceedings were had:

> "It was moved and seconded that we declare all future settlement wheat sold at the price of 53 cents per bushel. Motion carried. It was moved and seconded that our nonstockholders have preferred claims in payment for future settlement wheat. Motion carried."

We note there was controversy as to whether in fact there was any surplus, and if so whether it belonged to the signers of the note or to all of the stockholders, that is, the corporation. At a special stockholders' meeting held May 5, 1932, it was voted to apply this "surplus" of $3,388.37 on the note, and a motion was made and carried to authorize the board of directors to collect the note. Notwithstanding the action at the special stockholders' meeting on April 12, 1933, the company, after giving credit for the "surplus" of $3,388.37, assigned the note to the defendants, who were all stockholders and creditors of the company, the consideration being the satisfaction of McGowan's note for $166.30, his salary claim for $33.70, and the cancellation or satisfaction of claims for wheat previously delivered by the remaining assignees in varying amounts at the stipulated price of 53 cents per bushel. At a stockholders' meeting held June 2, 1933, it was voted that the company deed the elevator and property covered by the mortgage of $7,500 to the mortgagee in full satisfaction.

On June 7, 1933, in an action in the district court, the company was declared insolvent, and a receiver was ap-

pointed. The assets of the company which he received consisted of some personal property and equipment, a small stock of goods and about $1,000 of accounts receivable. The liability for wheat received and not paid for, according to claims filed in the receivership, was about $15,000. There were also some other liabilities, and in addition thereto, there are to be considered the claims offset against the note. The receiver brought this action to set aside the credit given on the note and the assignment of it, and to recover possession of the note.

At the trial, the above facts were either admitted or developed by the evidence and it is not deemed necessary the evidence be further detailed. The trial court, in a written decision, held there was no surplus of $3,388.37 and that it was wrongfully applied and was not a proper credit; that the note was not an accommodation note nor were the signers accommodation signers within the meaning of R. S. 52-306; that the note represented a voluntary assessment by the then stockholders in order to sell stock to new purchasers at par; that although a corporation when insolvent may prefer creditors, this note was an obligation for capital stock and as such constituted a trust fund for the benefit of general creditors of the corporation. The journal entry of judgment shows the trial court held the receiver should recover possession of the note; that the note was not subject to the claimed credit of $3,388.37, nor subject to any credit claimed to be due the defendants on account of wheat stored with the insolvent corporation or on account of other obligations due from the corporation, but that they had claims as general creditors, and that the assignment should be set aside. A motion for a new trial was denied, and the defendants appeal.

The question presented by the appeal is this: Where stockholders of a corporation, who have paid their original stock subscription in full, deliver to the corporation their note for the purpose of making good impaired capital so that the company may continue in business and sell treasury stock at par, and the note is thereafter carried as an asset and stock is sold, and thereafter some of the makers of the note and other stockholders and other persons became creditors of the company, which becomes insolvent, does the note become an asset of the corporation in the nature of a trust fund for the benefit of all the creditors, or may the corporation assign the note to ten stockholders, eight of whom are makers of the note, in satisfaction of claims totaling the balance said to be due upon the note?

Appellants' principal complaint is based on the contention the trial court erred in holding that the note, carried as an asset of the corporation until it became insolvent, constituted a trust fund for the benefit of all the creditors of the corporation, and prevented the corporation from preferring creditors. With respect to the contention made by the pleadings that the note was an accommodation note and without consideration, it might be sufficient to say that the contract made at the time it was given, and a paragraph of which is quoted above, shows an arrangement for payment of the note which is inconsistent with any claim of accommodation. Although the contract was not as complete, the contract and the admitted facts show a situation quite similar to that in *Farmers Equity Coop. Ass'n* v. *Tice*, 122 Kan. 127, 251 Pac. 421, where it was said:

> "The defendant was a stockholder in the plaintiff association and interested in its welfare and progress. He was interested in seeing that its business was carried on. The execution by the other stockholders of their notes for the benefit of and to aid the

company in which the defendant was interested was a valuable consideration for the execution of his note" (p. 130).

And the maker of the note was held liable. A similar situation was involved in *Farmers Cooperative Union* v. *Reynolds*, 127 Kan. 16, 272 Pac. 108, where it was held:

> "Where a corporation is in financial difficulties, its shareholders may bind themselves by resolution at a stockholders' meeting and by execution and delivery of their several promissory notes responsive thereto, to strengthen its credit, and to guarantee the members of the corporation's board of directors against liability or loss through their individual obligations on behalf of the corporation; and a defense to such a stockholders' note based upon want of consideration and want of mutuality is not good" (Syl. 3).

We hold the note was not given for the accommodation of the grain company nor was it without consideration flowing to the makers.

It is urged that under *Plow Co.* v. *Rude*, 60 Kan. 145, 55 Pac. 848, where this court held:

> "In the absence of charter or statutory restrictions, and in the absence of actual fraud, a corporation, though insolvent, and though it has ceased, or determined to cease, doing business, may prefer certain creditors over others, whenever a natural person could do so" (Syl. 2).

a valid preference could be made. In that case this court refused to apply the trust-fund doctrine to the facts of the case. It must be borne in mind, however, that the case did not treat of facts as we have them in the case at bar, for there the preferred creditor was not an officer, agent, director or stockholder of the insolvent company. In the

above decision attention is directed to *Hays* v. *Citizens' Bank*, 51 Kan. 535, 33 Pac. 318, where it was held:

> "The directors of an insolvent corporation, and who are creditors of the same, cannot, while they continue in the control of its affairs and assets, take any advantage of their position to secure preference or advantage for themselves over other creditors, but must share ratably with the other general creditors in a distribution of the company's assets" (Syl.).

Appellants also rely on *Morisette* v. *Howard*, 62 Kan. 463, 63 Pac. 756, where it was held:

> "A strictly private corporation, owing no peculiar duties to the public, has the same dominion over and power to dispose of its property that an individual has; and, when the exigencies of its business render it necessary, it may, if done in good faith and with the assent of its stockholders, discontinue business and dispose of its entire assets and property, with a view of paying its debts and closing up the affairs of the corporation" (Syl. 1).

The case is distinguishable from the case at bar, for there the purchaser claiming right of possession of certain corporate assets was not connected with the corporation.

In *Bridge Co.* v. *Fowler*, 55 Kan. 17, 39 Pac. 727, it was held:

> "Where a corporation is heavily indebted to its officers and stockholders, and such officers and stockholders enter into an agreement to discontinue business and divide and distribute the entire capital and assets of the corporation among themselves in payment of the indebtedness which they hold against the corporation, and when in accordance with the agreement they have wound up the business and distributed the assets, and there remains a large indebtedness unprovided for, the

transaction will be deemed to be invalid as to any excluded creditor. In such case the property and assets of the corporation will be deemed to be held in trust for the payment of the debts of the corporation, and any excluded creditor will be entitled to pursue it into the hands of any member of the corporation or other person who has taken the same with full knowledge of the facts; and if it has passed out of their hands they may be compelled to account to such creditors, and to contribute pro rata toward the payment of the unpaid debts of the corporation to the extent of the funds so misapplied" (Syl. 1).

In *Brokerage Co. v. Dunn*, 91 Kan. 64, 136 Pac. 939, one Chesebro started in business and purchased goods from the brokerage company which he had not paid for when he and others formed a corporation, hereafter called the fruit company, which assumed the obligation, and the brokerage company therefore claimed to be a creditor and entitled to receive the full amount of its claim. Appellee claimed that Collins of the Brokerage Company was himself the fruit company, and that shares of the fruit company were full payment for all the assets and credit turned over to it. Chesebro testified that Collins furnished him all the goods when he first started business, later procured the incorporation of the fruit company, and that stock issued to Chesebro belonged to Collins, who later advanced moneys for use of the fruit company. We are not concerned with the details of the claim, etc., but in discussing the question of right of off-set, it was said:

"If, as the testimony tends to show, Collins was the Garden City Fruit Company, and that he turned over whatever interest he had in the company, whether it be goods or claims, to pay for the shares of stock issued to Chesebro for him, he is not entitled to set up any claim that he owed to himself as a liability against

> the corporation. So far as creditors are concerned, the capital stock must be treated as a trust fund pledged for the payment of the debts of the corporation, and one who subscribed for stock must pay for the same either in money or money's worth (10 Cyc. 472)" (p. 66).

And the holding of the court, as stated in the syllabus, was:

> "The capital stock of a corporation is a trust fund for the benefit of the general creditors of a corporation, and one who subscribed for shares of stock must pay for them either in money or in money's worth" (Syl. 1).

In *Bank* v. *Milling Co.*, 101 Kan. 446, 167 Pac. 1036, the milling company, being indebted to the bank for a large sum, entered into an agreement to turn over its property to be converted and sold and the proceeds applied to the payment of the debt. A few days after the agreement was made, a Mrs. Shepard brought suit against the milling company to rescind a sale of milling company stock to her. Ultimately she prevailed. During the pendency of her suit, receivers were appointed for the milling company and sold its assets. Mrs. Shepard intervened in that action and asked for an order directing payment of her claim. The trial court ruled that she had no right to participate in the funds to the detriment of the bank, and she appealed. This court quoted with approval the definition of the trust-fund doctrine in *Hospes* v. *Northwestern Manuf'g & Car Co.*, 48 Minn. 174, 50 N. W. 1117, reciting:

> "The capital of a corporation is the basis of its credit. It is a substitute for the individual liability of those who own its stock. People deal with it and give it credit on the faith of it. They have a right to assume that it has paid-in capital to the amount which

> it represents itself as having, and if they give it credit on the faith of that representation, and if the representation is false, it is a fraud upon them; and, in case the corporation becomes insolvent, the law upon the plainest principles of common justice says to the delinquent stockholder, 'Make that representation good by paying for your stock' " (p. 450).

and held that Mrs. Shepard had a right to participate, saying—

> "When a stockholder has satisfied all his obligations as such, and there remains nothing by way of unpaid subscription or liability growing out of his relation as stockholder, and he is in good faith a creditor of the corporation, he stands on an equal footing with other creditors and has the same right to treat the corporation as a stranger and adversary as they have. Under such circumstances he is not required to stand back until other creditors are satisfied, but may proceed along with them on equal terms" (Syl. 1).

While the briefs contain many citations of authorities defining the trust-fund doctrine, and appellants cite those criticising various applications of it, we do not deem it necessary to review them, for here it is undisputed that the note, although not given for original purchase of stock, was given to make good an impaired capital, it was thereafter carried as an asset of the company, other treasury stock was sold on the assumption the impairment of the capital had been made good, and the note was capital of the company and a part of the fund to which creditors were entitled to look for satisfaction of their claims.

The question whether an insolvent or failing corporation may prefer a stockholder who is a creditor is one on which there is considerable difference of opinion, although in 14a C. J. 901 it is said:

"The weight of authority, however, is to the effect that the corporation cannot prefer its own stockholders over its outside creditors."

However, in an annotation on right of corporation to prefer creditors, 19 A. L. R. 320 *et seq.*, under that portion dealing with stockholders (page 356), it is said:

"It is generally held that a preference by a corporation to a stockholder is valid to the same extent as if he were a general creditor. The reason advanced for allowing the preference is that a stockholder does not, except in the exercise of his right to participate in the selection of its officers, have any control over a corporation not equally open to other creditors. If he becomes a creditor he has the same right to receive payment, and the same means of redress in case it is not made, as do the other creditors" (Citing cases).

And on page 357 it is said several jurisdictions deny the right of an insolvent corporation to prefer a creditor who is a stockholder, citing cases. No Kansas cases are noted in either division.

In 8 Thompson on Corporations (3d ed.), page 300 *et seq.*, is a discussion of such power, wherein it is said:

"It is a well-settled principle of law that the stockholder who is not a director or other officer may deal with the corporation and the corporation with him in all respects as if he were in no wise interested in the corporation, and the fact of his being a stockholder in no wise detracts from his rights as a creditor. Positive as these rules are, it must be admitted that third persons who are creditors have not an equal advantage with a stockholder. The suggestion as made by some courts that stockholders are afforded special opportunities to take advantage of their knowledge of the embarrassed condition and insolvency of the corporation, has not been satisfactorily answered by the mere assertion that

> stockholders do not, except in the election of managing officers, have any control over the corporation not equally open to other creditors, and that the corporate business is conducted by instrumentalities created from the charter and not by the stockholders. This suggestion entirely overlooks the pertinent and powerful fact that a stockholder has at all times the right to inspect the corporate books and may be able at any time, with his finger on the pulse of the patient, to know its failing condition, and either demand security for its claim, or proceed to obtain a preference by taking judgment and levying execution on the corporate property and thus by reason of his relation obtain a preference that ordinary creditors are not able to obtain. In line with this view there are numerous holdings against the right of a stockholder to secure a preference over other corporate creditors" (p. 301).

(See, also, 15 Fletcher on Corporations, p. 718, §7484.) An examination of cases cited in support of the above texts shows those involving rights under preferred stock issues, preferences acquired by loans on a present consideration, others affected by statutory provisions, etc. A discussion of the right is also found in 7 R. C. L. 758 *et seq.*, where the division of authority is noted, it being there said the weight of authority allows such a preference. In discussing the view denying validity, it is said:

> "In jurisdictions in which the trust-fund doctrine, an insolvent corporation, of course, has no power to prefer the debt of one of its officers or stockholders, and many courts take the view that an insolvent corporation, though the general right to prefer creditors may exist, cannot prefer a creditor who is also a director or managing officer of the corporation" (pp. 759, 760).

It may well be argued that the officers of the corporation, being in active management, are fully aware of the

financial condition and should not be permitted to take advantage of their knowledge to the prejudice of general creditors, but that the stockholders, having voted for the directors, are then in a position to deal with the corporation in the same manner as a stranger to it. This argument is of considerable weight when applied to such corporations as the United States Steel Corporation, the Pullman Car Company, and others of similar size with widely scattered stockholders, but the greater number of corporations in this state include those where the stockholders have a much more intimate knowledge of what the corporation is doing, its financial situation, etc. In view of the fact the trust-fund doctrine has been recognized as the law of this state for over forty years, it seems the better rule to follow that when the corporation is insolvent or in a failing condition, it should not be permitted to so deal with its shareholders who are creditors that they receive a preferential right to the assets of the corporation to the detriment of the general creditors. They should receive their dues ratably with other general creditors.

Insofar as this rule is concerned, however, there is further reason why appellants should not prevail. The record does not show that any of the assignees of the note were directors; in fact, it shows only inferentially there was an active board of directors; but it does show that the giving of the note was arranged at a stockholders' meeting. The determination to settle with the owners of wheat delivered and unpaid for, at a stipulated price per bushel, and that nonstockholders should have preference in settlement, the delivery of the mortgaged real estate to the mortgagee in satisfaction of that claim, and the authorization to the board of directors to collect the note were all matters that were considered and acted on at the stockholders' meetings.

The stockholders were actually directing the conduct of the company's business to a considerable extent. Cases having to do with preferences to directors may not be strictly in point, but in view of the facts of the case before us may be persuasive.

*Jackman* v. *Newbold*, 28 F. 2d 107, 62 A. L. R. 739, bears on the general proposition involved. The directors of a construction company had advanced large sums of money to enable it to carry on. Ultimately the company concluded to wind up its affairs. In so doing, it transferred to the advancing directors paving bonds it had received for work done in satisfaction of the directors' claims, leaving little for general creditors. A receiver was appointed and brought suit to recover the bonds or their value, and the directors attempted to justify what had been done. From an adverse decision, director Jackman appealed to the circuit court of appeals. In disposing of his contentions, the court, in part, said:

> "However, where a corporation is insolvent in fact, or so nearly so that insolvency is practically certain, director creditors should not be permitted to appropriate the assets of the corporation to secure or pay a past indebtedness to the prejudice of other creditors * * *.
>
> "The law applicable to this situation is not difficult. It is merely common sense and common honesty, applied in the interest of fair dealing. In the vigorous opinion of Judge Philips in *Northwestern Mut. Life Ins. Co.* v. *Cotton Exchange Real Estate Co.*, (C. C.) 70 Fed. 155, 161, he said: 'A sound public policy, in my judgment, demands that when a business corporation has reached a point in its affairs when its directors know that it cannot pay its debts, and for the lack of sustenance, cannot longer do business, or cannot "act up to the design of its crea-

tion," it is then, to all intents and purposes insolvent. In such conjuncture its directors ought not to be permitted to take advantage of their position as managing officers to appropriate its remaining assets to the payment of their unsecured debts, to the exclusion of other unsecured creditors. Until overruled in this judgment, I shall continue to so administer the law.' This court in *Stuart* v. *Larson et al.*, 298 Fed. 223, 38 A. L. R. 79, reviewed the authorities and indorsed this language of Judge Philips * * *. Appellant as to his unsecured loans should take his place with the other general creditors and receive his fair pro rata. To permit an arrangement by the directors of a failing, if not an absolutely insolvent, corporation, whose stockholders months before had voted to liquidate the business of the corporation, to appropriate most of the assets of the company in payment of their own unsecured debts, thus according themselves preferential treatment at the expense of the other general creditors, would be in equity an abhorrent proposition" (pp. 111, 113).

If it be assumed a corporation may prefer a stockholder creditor, there is another reason why appellants here should not prevail. At the time the note was assigned, the assets of the company consisted of the elevator, which was within a few days conveyed to the mortgagee in satisfaction of the debt, cash, accounts and notes receivable and inventories, total $2,554.93 as of May 31, 1933, stock of a cooperative commission company carried at $1,626.77, and the note in question. The effect of the assignment was to transfer the note, or substantially all of the assets of the company, to the assignees. This was not authorized or approved by the vote of the holders of not less than four fifths in amount of the outstanding shares of capital stock, in the manner required by Laws 1931, ch. 154, sec. 1, R. S., 1933 Supp., 17-620a (See *First Na-*

*tional Bank* v. *Paramount Transit Co.*, 139 Kan. 808, 33 P. 2d 300).

And finally, another reason why appellants should not prevail is that under decisions noted the "trust-fund doctrine" is followed in this state. The note in question is a part of that trust fund, and the action is to follow and recover it. The undisputed evidence is that the assignees of the note took the same with notice of its character and gave nothing for it beyond the discharge of a preexisting debt. Under such circumstances the receiver as trustee was entitled to possession (See *Clingman* v. *Hill*, 113 Kan. 632, 215 Pac. 1013; *Levant State Bank* v. *Shults*, 142 Kan. 318, 47 P. 2d 80).

Appellants argue that if it be held the note was given for stock, it violated the provisions of Laws 1929, ch. 140, sec. 17 (R. S., 1933 Supp., 17-1239) in that it contained no requisite statement as "Given for shares in .....," and is therefore uncollectible. It does not appear this defense was made in the trial court, but if it were, it would not avail, for by section 2 of the act (R. S., 1933 Supp., 17-1224) securities of a cooperative association are exempt. The record does not disclose fully the nature of the grain company, but its name contains the word "Cooperative," which cannot be used by other than cooperative incorporations (See R. S. 17-1515 and R. S., 1933 Supp., 17-1627).

The judgment of the trial court is affirmed.

*In re Post & Davis Co.*, 219 Fed. 171 (C. C. A. 2, 1914).

Stock Corporation Law N. Y. (Consol. Laws, c. 59), § 6, provides that a corporate mortgage, except for purchase money, must be consented to by the holders of not less than two-thirds of the corporate stock, which consent must be given at a special meeting of the stockholders

called for the purpose, upon the same notice as that required for the annual meetings of the corporation; and a certificate under seal of the corporation that such consent was given by the stockholders in writing, or that it was given at a vote at a meeting as aforesaid, shall be subscribed and acknowledged by the president or vice-president, and by the secretary or assistant secretary, and shall be filed and recorded in the office of the clerk or register of the county wherein the corporation has its principal place of business. *Held*, that subsequent action or inaction of stockholders cannot take the place of previous action under such statute, and hence a chattel mortgage executed by a corporation without the required consent properly evidenced was invalid and could not be ratified.

Petition to Revise and Appeal from Order of the District Court of the United States for the Southern District of New York.

This cause comes here upon appeal by the trustee in bankruptcy and petition to revise an order of the District Court, Southern District of New York, directing him to turn over to Libbie Buggeln, the respondent, the proceeds of a sale of certain chattels claimed by her under a chattel mortgage made by the corporation to Elizabeth Post, the wife of its president and by her assigned to the respondent.

J. J. Lesser, of New York City, for appellant.

A. A. Wheat, of New York City, for appellee.

Before LACOMBE, COXE, and WARD, Circuit Judges.

LACOMBE, Circuit Judge. Three objections to the chattel mortgage were urged by the trustee. First. That there was no consideration proved. Second. That the mortgage had not been kept alive as a lien by proper refiling under the statutes. Third. That it was invalid be-

cause it was not executed in compliance with section 6 of article 2 of the Laws of 1909 (Consolidated Laws, c. 59). All three objections were overruled by the Special Master and the District Court. The last objection only need be here considered.

The statute referred to reads as follows:

> "Every stock corporation * * * may mortgage its property and franchises to secure the payment of such obligations, or of any debt contracted for said purposes. Every such mortgage, except purchase money mortgages and mortgages authorized by contracts made prior to May first, eighteen hundred and ninety-one, shall be consented to by the holders of not less than two-thirds of the capital stock of the corporation, which consent shall be given either in writing or by vote at a special meeting of the stockholders called for that purpose, upon the same notice as that required for the annual meetings of the corporation; and a certificate under the seal of the corporation that such consent was given by the stockholders in writing, or that it was given by vote at a meeting as aforesaid, shall be subscribed and acknowledged by the president or vice president and by the secretary or an assistant secretary, of the corporation, and shall be filed and recorded in the office of the clerk or register of the county wherein the corporation has its principal place of business."

It is conceded that the execution of the chattel mortgage was not consented to in writing at any time by the holders of not less than two-thirds of the capital stock, nor by a vote at a special meeting called for that purpose—nor indeed at any meeting—and that no certificate was filed and recorded in the office of the county clerk. It was not a purchase money mortgage.

There is testimony from which the Special Master found that the three stockholders, who held practically all

the shares, were aware of or participated in the preparation of the chattel mortgage and after it was filed did nothing to attack it. He reached the conclusion, as did the District Judge, that any irregularities as to the original execution of the mortgage were cured by the subsequent action or inaction of the stockholders; that there was a substantial consent by the directors and stockholders or a subsequent ratification by them, which would make the provisions of the statute inapplicable.

The language of the statute is most clear and specific; manifestly it was made so as to accomplish some purpose. That purpose is very plainly indicated on the face of the statute; it substitutes for mere oral expressions of assent, casually given it may be, an orderly permanent record which can be referred to. The provision, in the language of the New York Court of Appeals, "involves an application to the stockholders, and, on their part, consideration, judgment, and final determination, and, on the part of the assenting stockholders, a written expression of their conclusion." *Rochester Bank* v. *Averell,* 96 N. Y. 475. The same court has been liberal in its construction of the statute as to details of compliance. Thus in *Greenpoint Sugar Co.* v. *Whitin,* 69 N. Y. 335, a written assent was held good, although it did not itself state the amount of the debt which it was given to secure; the court saying "the defendant could not have been misled. The consent * * * was ample to put him on inquiry." In *Rochester Savings Bank* v. *Averell, supra,* it was held that a mortgage dated January, 1874, and invalid when originally filed because of the absence of any written assent, was validated by the signing of such an assent in November, 1894; the mortgage being then reacknowledged. "Such assent," says the court, "makes the instrument, as of the time it was given, a valid mort-

gage." It has also been held that a court of equity will enforce a mortgage given by a corporation without the written assent, where the mortgage is given by the corporation pursuant to a valid agreement made by it to give the mortgage, and in consideration of which agreement and in reliance upon which, the mortgagee gave property or other valuable consideration to the corporation. *Paulding* v. *Chrome Steel Co.*, 94 N. Y. 340; *Hamilton Trust Co.* v. *Clemes*, 163 N. Y. 423, 57 N. E. 614; *Black* v. *Ellis*, 197 N. Y. 402, 90 N. E. 958. Such mortgages are of the same type as the "purchase-money mortgages," which the statute itself expressly excludes from the operation of the section above quoted. The mortgage in the case at bar is not of this type; it was given to secure past indebtedness for moneys loaned from time to time during the five preceding years.

To hold that written assent of two-thirds of the stockholders may be dispensed with in this case would go much further than any decision of the New York Court of Appeals to which we have been referred or which we have found. There is no pretense that any written assent was ever signed, or that it was ever voted at any stockholders' meeting, special or general. If the statute had been so construed by the state court of last resort, we should follow its construction of the state statute; but until such a decision is cited, we are unwilling to fritter away the specific provisions of an act which manifestly were put there to accomplish a plain purpose. Respondent finds support for her contention in *Black* v. *Ellis*, 129 App. Div. 140, 113 N. Y. Supp. 558, but that cause was decided by a divided court, and we are in accord with the views as to the construction of this statute expressed by the minority. *Black* v. *Ellis* was affirmed in the Court of Appeals (197 N. Y. 402, 90 N. E. 958), but on another ground.

The order is reversed.

*Willcox* v. *Goess*, 92 F. 2d 8 (C. C. A. 2, 1937).

[Syllabi omitted.]

Appeal from the District Court of the United States for the Southern District of New York.

Consolidated suits by William R. Willcox, as trustee in bankruptcy of the J. A. M. A. Realty Corporation, bankrupt, against Frederick V. Goess, as receiver of the Harriman National Bank and Trust Company of the City of New York, to recover on the bankrupt's deposit account and to set aside certain preferences made by it to the bank. The First National Bank & Trust Company of Rochester intervened in one of the suits, and from a decree of the District Court for the Southern District of New York, all the parties appeal.

Decree affirmed in part and reversed in part, and decree entered in accordance with opinion.

Before L. HAND, AUGUSTUS N. HAND, and CHASE, Circuit Judges.

L. HAND, Circuit Judge.

[The first part of the opinion is omitted, and the following appears on 92 F. 2d 13 and 14:]

Suit No. 3.

In this suit the trustee seeks to recover the proceeds from the sale of a piece of real property—20 East 54th Street, in the City of New York. J. A. M. A. had owned this property, subject to a mortgage, and on October 13, 1931, Augusta Harriman, the owner of 11,352 of its 20,000 shares, executed as vice-president, a deed to the Harriman Securities Corporation. Harriman was the prime mover, and the deed was delivered as security for a loan of $400,000

made to J. A. M. A. the same day. This loan was completely paid by December 31, 1931, and the deed redelivered; but on March 21, 1932, the Securities Corporation again lent $50,000 and another $50,000 on April fourth; and the deed was redeposited as security on March twenty-fourth. While these two loans were still outstanding, the Securities Corporation delivered the deed to the Bank, at the same time executing to it a warranty deed, purporting to convey all its interest in the premises. These documents were delivered as security for Harriman's personal debts, and probably were also security for J. A. M. A.'s debts, because of a much earlier resolution that all its property held by the Bank should always be such security. The questions which these facts raise are two: first, whether the deed was a mortgage, originally valid as to its factum; and if so, whether it secured any other loan than the original $400,000 of October 13, 1931. Second, if it was and did, whether it was either a fraudulent conveyance, or a preference under section 15 of the New York Stock Corporation Law. If it was invalid for either reason, a second controversy arises between the trustee and the First National Bank & Trust Company of Rochester, a judgment creditor of J. A. M. A. as of November 16, 1932.

The first question is whether the mortgage was executed in compliance with section 16 of the New York Stock Corporation Law. In spite of the particular and stringent provisions of that section requiring either a shareholders' resolution *ad hoc*, or their written and acknowledged consent, the courts of New York have somewhat relaxed the text; and we have tried to follow, though sometimes with uncertain steps. *In re Post & Davis Co.*, 219 Fed. 171, we refused to accept later parol ratification by the shareholders; on the other hand in *Re Constantine Tobacco Co.*, (C. C. A.) 290 Fed. 128, where the holder of all the

shares executed the mortgage, and there had been in addition a shareholders' resolution, we thought these enough; while in *Re Victoria Fusilli Co.*, 79 F. 2d 611, we extended the exception to include a prior consent not in writing; acknowledging our doubts, but feeling justified by decisions of the New York courts. It must be owned that these rulings have made very free with the words of the act; and—though we do not wish to retract—we deem it a minimum condition that the required number of shareholders shall personally consent to each mortgage, and that they shall not attempt to delegate their power—perhaps the same thing. This we are holding in the companion case of *In re J. A. M. A. Realty Company*, (C. C. A.) 92 F. 2d 3, handed down herewith.

We will assume *arguendo* that, because of its execution by Augusta Harriman, who owned more than one-half the shares, and because of its procurement by her husband, the deed was a valid security for the original loan of $400,000. That loan was paid, as we have said, and the deed was returned on December thirty-first. The parties might probably have kept the lien alive by express consent, even after that (*Salvin* v. *Myles Realty Co.*, 227 N. Y. 51, 56, 124 N. E. 94, 6 A. L. R. 581); though there must be a specific contract expressly to that effect (*Bogert* v. *Bliss*, 148 N. Y. 194, 42 N. E. 582, 51 Am. St. Rep. 684); but there is nothing in the record to show that they did so. It is therefore a little hard to see how the two loans by the Securities Corporation of March twenty-second and April fourth were secured, in spite of the redelivery of the deed. But we are not concerned with these; the question is of the mortgage to the Bank. The form chosen for that was a conveyance by the Securities Corporation of the lien without the debt, and it is well settled that in general that is unavailing,

since the lien is merely an appurtenance. We will nevertheless *arguendo* ignore the form of the transaction, and look at it as a whole and to its underlying intent. The Bank was to have the property as security for Harriman's personal debts, and J. A. M. A. later substituted other security with the Securities Corporation. However, if that intent was so manifest that the form made no difference, what happened was in substance that the Securities Corporation reconveyed to J. A. M. A., and J. A. M. A. mortgaged the property to the Bank; and if that had all been written out, the defect would have been evident at once. Unless the mortgage was authorized as the statute required, no lien arose. Equity may, and indeed should disregard form; but equity may not, any more than law, disregard the conditions imposed by statute upon the substance of a legal transaction. This was a mortgage against whose creation by ordinary means the legislature had interposed conditions which no court might disregard—in equity as little as at law. Indeed, the record does not even show that Augusta Harriman knew that she was executing a mortgage in the first place; Hughes, the bookkeeper, merely said that he gave her the deed without explanation and that she signed it; doubtless she would have signed whatever her husband told her to. Be that as it may, on no conceivable theory did she consent to the mortgage to the Bank. Nor will the resolutions of January 26, 1923, and November 17, 1924, answer the requirements; they did indeed authorize Harriman to "pledge" any property of the Company and to borrow at will, but section 16 was directed exactly against such an omnibus authority; the meeting of shareholders must be called "for such purpose," that is, to consent to a specific mortgage, not to mortgages in general; nothing else will give that protection which was thought necessary. Thus the mortgage was void to its factum, and

was a nullity. *Leffert* v. *Jackman*, 227 N. Y. 310, 125 N. E. 446; *In re James, Inc.*, 30 F. 2d 555 (C. C. A. 2).

*Vail* v. *Hamilton*, 85 N. Y. 453 (1881).

Under the provision of the General Manufacturing Act (Chap. 40, Laws of 1948, as amended by § 2, chap. 517, Laws of 1864, and chap. 481, Laws of 1871), authorizing a manufacturing corporation to mortgage its property upon first obtaining and filing the written assent of the owners of two-thirds of its capital stock, where the corporation is itself the owner of a portion of its stock, it cannot give assent for the shares so owned by it to make up the requisite two-thirds, nor can the assenting stockholders be deemed to represent a proportionate amount of the stock owned by the corporation.

As to whether the shares so held by the corporation may be deducted from the whole number in ascertaining if the assent of the requisite two-thirds has been obtained, *quaere.*

Where the corporation has transferred by assignment, absolute on its face, certificates of stock so owned by it, as collateral security for debt, the shares so transferred at least cannot be deducted.

*It seems* that the assignee of such stock is a stockholder within the meaning of said provision and is entitled to sign the assent.

A receiver of such a corporation may maintain an action to set aside a mortgage executed by it without the requisite assent of stockholders.

Appeal from judgment of the General Term of the Supreme Court of the first judicial department, entered upon an order made May 5, 1880, affirming a judgment in

favor of the plaintiff, entered upon a decision of the court on trial at Special Term (Reported below, 20 Hun. 355).

This action was brought by plaintiff, as receiver of the Secor Manufacturing Company, to set aside a mortgage upon its property executed by it.

Said company was organized under the act authorizing the formation of corporations for manufacturing purposes (Chap. 40, Laws of 1848). Its capital stock consisted of five thousand shares, all of which had been duly issued and recorded upon the books of the company prior to the 1st of January, 1874. In March of that year, nine hundred and forty shares of this stock had been transferred to and were then the property of the company. Afterward and on or before the 22d day of July, 174, five hundred of these shares were transferred by the company to F. A. Conkling, for the purpose of securing an indebtedness due by it to him, and were properly entered in his name upon the transfer books of the company. The certificates were delivered to him and recited that he was the proprietor of the five hundred shares. On the 1st day of October, 1874, the company executed to the defendants herein, as trustees, a mortgage upon all of its property, real and personal, to secure the payment of its bonds to the amount of $100,000, to enable the company to raise money to meet its obligations, and among other things, to secure such of the trustees "as have or may make advances or loans, or on indorsements made, or which they may make, for the company." At the same time a written assent to this mortgage was signed by stockholders owning two thousand seven hundred and sixty-four shares of the capital stock of the company, and by the said "Secor Sewing Machine Company" (by "E. Miller, Sec., and L. H. Mace, Pres."), claiming to be a stockholder to the amount of the nine hundred and

forty shares aforesaid. Conkling neither knew of nor assented to the mortgage, or that assent was given thereto by any one. The company became insolvent, and plaintiff, in July, 1877, was appointed its receiver; he brought this action to set aside the above mortgage, upon the ground that the necessary assents thereto were not given. The Special Term found that the written assent of stockholders owning two-thirds of the capital stock was not filed, or at any time given, to the execution of the mortgage, and judgment was rendered according to the prayer of the complaint.

DANFORTH, J. The persons who became "a body politic and corporate," under the name of the "Secor Sewing Machine Company," were made capable of buying, purchasing, holding and conveying in their corporate name any land, goods, wares and merchandise, necessary to enable the company to carry on the operations named in their certificate of incorporation. But while a certain limited number of the stockholders, to be called trustees, were empowered in that character to manage this property and the stock and concerns of the company, neither in a corporate capacity, nor through its trustees, was it permitted to mortgage the same without first obtaining and filing "the written assent of the stockholders owning at least two-thirds of the capital stock of such" company (Laws of 1848, chap. 40, §§ 2, 3; Laws of 1864, chap. 517; Laws of 1871, chap. 481). It is noticeable that there is thus called into action, the corporation as an artificial entity, the body of the trustees as its agent, and lastly, the constituent members of the corporation or the several individuals composing it. To each of these a duty is assigned, and to make valid the transaction now before us, it is plain that something more than corporate action was required. The corporation

might become a party to the mortgage, and the trustees direct its officers to execute it; but there must still be the assent of the stockholder. The will of the whole body, expressed by vote or resolution, cannot take its place. The name of the corporation is signed to the assent. This, if it amounts to any thing, must be the result of corporate, not individual, action. It was signed by its officers, and their act to bind even the corporation must have been official; it can have no force as representing an individual. As to nine hundred and forty shares, therefore, there is no other assent to the mortgage in question than that of the corporation. The mortgage itself must be deemed a corporate act, and assent thereto by the same body can give it no additional validity. As to those shares assent has not been given. It follows also that as the corporation cannot assent for the stockholders, neither can one stockholder for another; nor can one who assents on the strength of stock standing in his own name be deemed to represent a proportionate amount of the stock owned by the corporation. It is claimed, however, by the respondent that if neither the corporation nor the general stockholders can be deemed to represent, by their assents the nine hundred and forty shares, they should be deducted from the whole number, and then the assents of the stockholders would be enough. But however this may be with the residue, the shares transferred to Conkling ought not to be so treated. As to them, at least, there was no merger in the general fund of the company. They were, in the first instance, duly issued for value received by it, and might be lawfully repurchased or taken in payment of debts due or otherwise acquired by the corporation. In some way it had become the owner of these shares, not for the purpose of diminishing its capital stock, but for enjoyment as property. As such they stood upon its books, until in the regular transac-

tion of business the stock was transferred to Conkling. The company had a right to hold it unextinguished, and a right to reissue it (*City Bank of Columbus* v. *Bruce and Fox*, 17 N. Y. 507). The facts adverted to show that they availed themselves of this right. It is true the shares were transferred to Conkling as collateral security, but the certificate was absolute in its terms, and he was described therein as owner. He so appeared upon the proper books of the corporation. Under such a title he had power to render the security available by sale to satisfy the debt on default of payment, and until the debt was satisfied he was the one interested in protecting the property represented by the shares, from diversion by liens or preferences improperly created. The company had a right of redemption, and so had an equitable interest in the stock; but upon the defendants' theory they could without redemption overreach the legal title by creating a mortgage, which, when enforced, would extinguish it, and until that event deprive it of value. Conkling had a clear interest in that matter. Except as limited by statute, no stockholder, by any title, could have more, or greater rights, or be subject to other liabilities. He is relieved by statute from personal liability as stockholder (Laws of 1848, chap. 40, § 16). He would otherwise be bound for the debts of the corporation, for a creditor need in general look only for the legal title (*Adderly* v. *Storm & Bailey*, 6 Hill. 624; *Rosevelt* v. *Brown*, 11 N. Y. 148; *In re Empire City Bank*, 18 *id.* 199). For the same reason he had a right to vote; his character upon the books of the bank would be conclusive upon the inspectors (*In re Long Island R. R. Co.*, 19 Wend. 37). And whether section 17 of the act of 1848 (*supra*) could, under any circumstances, be so construed as to deprive one with such a title from voting, it is not necessary to inquire, for the question does not arise; but it is clear that except for the permission

given in that section, even a pledgor could not vote. It has no application to an assent required to be given in writing to a specific act of the corporation, and which, without qualification, the statute requires to be given by a stockholder. Such, we have no doubt, was the character of Conkling as to the five hundred shares in question, at the time of the execution of the mortgage. Including these shares as part of the stock to be represented, the assent required by statute was not given and the mortgage is of no validity. It was, however, an apparent lien upon the property embraced in it; and we concur with the General Term in the conclusion that the action was well brought by the receiver to remove it (Laws of 1858, chap. 314).

The judgment appealed from should, therefore, be affirmed, with costs.

All concur, except Folger, Ch. J., absent.

Judgment affirmed.